No. 22,106

IN THE

United States Court of Appeals

For the Ninth Circuit

CASA DORINDA ESTATES, also known as SANTA MARIA ACRES APARTMENTS, a copartnership, et al., Debtor,

Appellant,

vs.

ALL-YEAR WEATHER, INC.,

Appellee.

On Appeal from the United States District Court for the Central District of California

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

The Referee sat at the trial Court in this matter. He made adequate findings of fact and conclusions of law to support his order restraining foreclosure proceedings by Appellee. There is substantial uncontradicted evidence in the record to support his findings. They are not clearly erroneous. In fact they are the only ones that could have been made upon the evidence introduced at the hearing. The granting or denying a petition for a restraining order is a matter that lies within the reasonable discretion of the Referee. There is no showing of any abuse of this discretion.

Whether or not the District Court rejected the Referee's findings, such findings of the Referee are decisive upon appeal unless clearly erroneous. The purported findings and conclusions of law of the District Court should be disregarded on appeal unless those of the Referee are clearly erroneous.

The doctrines of estoppel and fraud have no application in this matter. There has been no change of position by Appellee or anyone to his detriment. Appellee has received each and every thing it was to receive in any agreement with Herters or Appellant. It has sustained no damage whatsoever. There can be no doubt that the Appellant has a very substantial equity in its property which will keep Appellee fully secured for a considerable period. It therefore cannot suffer any substantial injury by a delay for a reasonable part of that period so that Appellant may have an opportunity to realize upon such equity and rehabilitate itself.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE DISTRICT COURT DO NOT CONTROL IN THIS APPEAL.

The Referee presided at a hearing at which testimonial and documentary evidence was received. He made findings of fact and conclusions of law based on this evidence. Upon review of the Referee's order the District Court received no evidence whatsoever, not a single witness testified and not a single document or exhibit was received. Yet the District Court purported to make findings of fact. In this connection it

is to be noted that the District Court crossed out and thereby refused to make a purported "finding" that the Referee's findings of fact and conclusions of law were clearly erroneous. In view of the evidence and the facts it could not have done otherwise.

Findings No. 2 and No. 3 of the District Court are not findings of fact based upon evidence but are merely a statement of a portion of the proceedings had before the Referee. Even if a partnership is held not to be an entirely separate legal entity in Chapter XI proceedings and the Referee erred in sustaining the objection to the question of whether Dr. Barnes owned property not listed in the debtor's schedules, then the matter should have been remanded to the Referee to receive evidence in this connection.

Findings Nos. 4, 5 and 6 of the District Court are not "findings of fact" based on evidence. They, too, are a statement of an occurrence in the proceedings before the Referee and before the District Court. The offer before the Referee had six (6) conditions attached to it (R.T. 12/27/66 pp. 6-7). No offer to pay the reasonable costs of administration was made before the Referee. Finding No. 7 was crossed out; the District Court thereby refusing to "find" the Referee's findings and conclusions were clearly erroneous. Finding No. 8 that "The Referee abused his discretion in restraining All-Year Weather, Inc. . . .", is a pure legal determination upon review. It is not a "finding of fact or a conclusion of law" in the sense used in connection with the issuance of a judgment or order upon a contested hearing before a trial judge. Upon

a review of a Referee's order the District Court sits as an Appellate Court and renders an opinion as to the correctness of the proceedings before the Referee. It does not substitute its findings or conclusions for those of the Referee unless those of the Referee are clearly erroneous. It does not substitute its discretion for that of the Referee unless the Referee has clearly abused his discretion. Even though the Referee erred in sustaining an objection (which Appellant denies), this does not mean he has abused his discretion in granting a restraining order. No one knows what the facts are about the individual partners' ability to pay the debts of the partnership although Appellee repeatedly *assumes,* without any evidence or basis, throughout its brief that the partners had such ability. Evidence upon this point was excluded.

THE REFEREE'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ARE CONCLUSIVE UPON AN APPEAL UNLESS THEY ARE CLEARLY ERRONEOUS.

Upon an appeal from an order of a District Court reversing an order of a Referee, the Appellate Court recognizes and acts upon the findings of fact, conclusions of law, and order of the Referee unless they are clearly erroneous.

Lines v. Falstaff Brewing Co., 9 Cir., 233 F. 2d 927, 930 (Appellant's Opening Brief, p. 13);

Snider v. England, 9 Cir., 374 F. 2d 717 (Appellant's Opening Brief, p. 15);

Lundgren v. Freeman, 9 Cir., 307 F. 2d 104 (Appellant's Opening Brief, p. 15).

The conclusions of law and any order of a Referee wherein his discretion is involved are binding upon appeal unless such conclusions are clearly erroneous or the Referee abused his discretion. Any litigant contending the Referee abused his discretion, as Appellee did upon review before the District Court, must make a strong showing of prejudice to itself.

In *Hoppe v. Rittenhouse*, 9 Cir., 279 F. 2d 3, at page 9 it is stated:

> "The rule applied in Fazio is pertinent where the primary facts can fairly be said to admit of but one reasonable *conclusion* (emphasis added), and yet this principle does not change the equally settled rule that where the basic and undisputed facts are fairly susceptible of diverse inferences requiring different conclusions, the determination made by the trier of fact (Referee) is conclusive on review unless that finding is 'clearly erroneous' ".

In *California Airmotive Corp. v. Bass,* 9 Cir., 354 F. 2d 453, at page 455, it is stated:

> "As we have previously written, 'In the conduct of any judicial or quasi-judicial hearing, reasonable discretion must be vested in the officer (Referee) who guides the course of the proceedings. We could not find an abuse of such discretion absent a *strong showing of prejudice* to the litigant making the charge of such abuses . . ." (emphasis added).

Accord:

> *In Re Tyne,* 9 Cir., 234 F. 2d 907 (Re partnership ownership of real property).

Therefore, despite Appellee's contentions to the contrary, the Referee's findings of fact, conclusions of law, and exercise of discretion are controlling on appeal unless clearly erroneous or the order was unreasonable and therefore an abuse of discretion.

THE FINDINGS OF FACT OF THE REFEREE ARE ADEQUATE TO SUPPORT THE REASONABLE EXERCISE OF HIS DISCRETION IN GRANTING THE RESTRAINING ORDER.

Appellee states on page 13 of its Brief that the findings are sparse and implies they are inadequate to support the Referee's order. The Referee made specific findings of the value of Debtor's property and the total of all liens on it, thereby establishing Debtor had an equity of $665,000.00 in its property (C.T. p. 28, lines 18-25). Upon the *facts* presented to the Referee only one further finding or conclusion could have been made in addition to those actually made. Evidence was introduced to the effect that interest was accuring upon the total liens on Debtor's property at the rate of $2,000.00 per month (R.T. 12/27/66 pp. 4-5). Upon this basis a finding or conclusion could have been made to the effect that an order restraining foreclosure of Appellee's trust deed upon Debtor's property for a reasonable time would cause Appellee no substantial injury. Debtor's equity of $665,000.00 will keep Appellee fully secured for any such reasonable period.

The Referee's findings of fact are fully adequate to support the order restraining Appellee from foreclosing. The fact that Appellee would not be substantially

injured by the restraining order is a negative proposition rejected by the Referee and no finding to such negative effect is required. Only the facts essential to support the order need to be found. The finding that the restraining order would not cause Appellee any substantial injury can be inferred from the finding that establishes that Debtor has an equity of $665,000.00 in its property.

In 5 *Moore's Federal Practice,* at page 2656, it is stated:

> "The ultimate test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issue to form a basis for the decision and whether they are supported by the evidence. In addition, they should be concisely stated, non-argumentative, and free from conclusions of law and redundancy. . . Findings need not assert the negative of rejected propositions."

at page 2659:

> "And the Court need not find on every issue requested, but a finding of such essential facts as lay a basis for the decisions is sufficient."

at page 2661:

> "Findings of the trial Court (Referee here) 'are to be construed liberally in support of a judgment or order. Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn' ".

The Court is required to make only such findings of fact as will support the judgment and not all such

findings as will fully present every possible view of the case.

> *Sonken-Galamba Corp. v. Atchison, Topeka & Santa Fe Ry. Co.* (W.D. Mo. 1940) 34 F. Supp. 15.

In 5 *Moore's Federal Practice,* at page 2660, it is stated:

> "Clearly the rule does not require the Court to make elaborate findings upon all such facts as will present every possible view of the case."

Appellee belittles the definition of discretion as made in *Lines v. Falstaff Brewing Co.,* 9 Cir., 233 F. 2d 927, 932, as being "reasonable man gloss" (Appellee's Brief, p. 15). It is apparent Appellee does not feel a reasonable exercise of judgment is a proper use of discretion. When Appellee has no answer as to the existence of a fact or proposition of law it seeks to offset the effect thereof by use of derogatory adjectives.

REHABILITATION OF THE DEBTOR IS A PRIMARY PURPOSE OF A CHAPTER XI PROCEEDINGS.

Appellee repeatedly throughout its Brief (pp. 6, 10, 11, 15, 16 and 21) states and implies that the payment of unsecured creditors is the sole purpose of a Chapter XI proceedings. Appellant respectfully submits that the authorities cited and quoted from on pages 16-18 of its opening brief clearly establish that rehabilitation of the Debtor is also a primary purpose of such a proceedings and that the powers

given the Bankruptcy Court are equally available for both of such purposes. This principle is well supported by authority contrary to Appellee's contention.

Appellee on page 6 of its Brief cites *In re Tracy,* 194 F. Supp. 293, N.D. Cal. 1961, and *In re Brown,* 84 F. 2d 433, in support of its statement that the payment of unsecured creditors is the primary purpose of a Chapter XI proceedings. Neither of these cases are authority for the proposition that payment of creditors is the sole purpose of a Chapter XI proceedings or that rehabilitation of the Debtor is not also a primary purpose of such a proceedings, or that *both* purposes should not be accomplished if possible. In fact these case are authority to the effect that keeping the Debtor in business and protecting the equity for the benefit of the Debtor itself is also a purpose of such a proceeding.

In re Tracy, 194 F. Supp. 293, N.D. Cal. 1961, at p. 295, it is stated:

> "A Chapter XI proceeding may arrange only the rights of unsecured creditors, without alteration of the rights of secured creditors (citations). Nevertheless, the Court may, upon notice and for cause shown, stay or enjoin any act to enforce a lien upon the property of a debtor (citations). The exercise of this power lies within the discretion of the Referee, and his decision to exercise such power must be sustained unless he has abused that discretion. . . .
>
> "Its objective (Chapter XI proceeding) is to pay his unsecured creditors in an orderly and expeditious manner, AND *to keep him, if possible,*

> *from being put out of business by his unsecured creditors.*" (All emphasis added.)

In re Brown, 7 Cir., 84 F. 2d 433, at 434, it is stated:

> "A court of equity, however, has the power to enjoin the holders thereof from an immediate sale, *if such sale will operate to the injury of the DEBTOR, as well as to other creditors* (all emphasis added). This power is given the Court upon the theory that there may be an *equity* in the pledged security over and above the amount of the indebtedness secured thereby, and that such *equity* will inure to the benefit of the *debtor* and of his other creditors." (Emphasis added.)

Appellee contends on page 12 of its Brief that Debtor should be estopped to claim title to the property because it allowed Herter to appear as owner and borrow money and give a deed of trust. Appellant concedes that Appellant should be estopped to deny Herter had title to an extent that the deed of trust given by Herter to Appellee should be held valid. Appellant has never contended Appellee's deed of trust is not valid. In fact Appellant stipulated as to its validity in the above entitled proceedings. The principle of estoppel is not applicable beyond Herter being held to be the actual owner for the purpose of giving said deed of trust.

The cases cited by Appellee on page 12 of its Brief so limit the effect of any such estoppel. No damage has been suffered by Appellee for it has *received everything* it bargained for with the Herters, e.g. the

personal liability of the Herters and a valid deed of trust on the property. Damage is a necessary element of estoppel.

Kierulf v. Metropolitan Stevedore Co., 9 Cir., 315 F. 2d 839, 842.

Therefore Appellant is making no claim or contention whatsoever that it should be estopped from making and estoppel has no application to this matter.

A PARTNERSHIP QUALIFIES AS A DEBTOR IN A CHAPTER XI PROCEEDINGS SEPARATE AND APART FROM PARTNERS AND THE QUESTION OF THE SOLVENCY OF INDIVIDUAL PARTNERS IS IMMATERIAL TO SUCH AN ARRANGEMENT PROCEEDINGS.

The Referee sustained an objection to a question inquiring into what assets an individual partner possessed. If this was reversible error the matter should be remanded for the purpose of receiving such evidence. There is no evidence in the record establishing the assets and liabilities of either partner or establishing their individual solvency. However, this has not prevented Appellee from assuming the partners are solvent. Appellee states, entirely without support, repeatedly in its Brief (pp. 4, 5, 9 and 20) that the partners were solvent. There is no basis whatsoever for this statement in the record. Appellee does not hesitate to assume any fact it feels might be advantageous to its cause. It accuses the Appellant of filing a frivolous appeal and of fraud and mendacity without any grounds therefor whatsoever upon the basis of fictitious facts it has assumed.

It is true that in a straight bankruptcy matter that the assets and debts of individual partners are considered in determining the solvency of the partnership. In straight bankruptcy proceedings the legal definition of insolvency is used—that is the relationship of the reasonable value of all assets to the total of all liabilities. In a Chapter XI proceedings the equity definition of solvency—ability to pay debts as they mature (11 U.S.C. 723) is used.

In the instant case the Debtor partnership is *solvent* in the legal sense. Its assets, of its own with no reference to whatever assets, if any, of individual partners, exceeds its liabilities by $665,000.00. Thus the question of what additional assets individual partners may have is immaterial. The question involved here is whether or not in this circuit, by virtue of the decision in this case, it is to be the law that under 11 U.S.C. 723 a partnership Debtor must allege that it, as a separate entity, is unable to pay its debts as they mature or allege that it and its individual partners are unable to pay its debts as they mature. Appellant respectfully submits that in a Chapter XI proceedings a partnership should be considered a legal entity in and of itself, separate and apart from its partners. Otherwise many problems of subordination in respect to individual creditors and further contribution of capital by partners will arise. In any event creditors always have their right to proceed directly against the partners on their personal liability for partnership debts.

For a general discussion to the effect that a partnership should be held to be such a complete separate entity see 1 *Collier on Bankruptcy,* Sec. 5.03, p. 693 et seq.

APPELLANT HAS A SUBSTANTIAL EQUITY IN ITS PROPERTY WHICH SHOULD BE PRESERVED FOR ITS BENEFIT AS WELL AS THE BENEFIT OF ITS CREDITORS.

Appellee in its Brief at page 20 states there is grave doubt if Appellant has a substantial equity in its property. Again Appellee has made a vague general statement without any supporting facts or reasons. The evidence as to value received on December 27, 1966 is clear. It stands uncontradicted in the record (R.T. 12/27/66, pp. 83, 90). It is corroborated by evidence of actual sales of a parcel of Appellant's property and other comparable sales (R.T. 12/27/66, pp. 85, 87). Appellee had full opportunity and ability to offer evidence pertaining to value. It made no attempt to offer any such evidence at the initial hearing on December 27, 1966 or at the continued hearing on January 5, 1967 after it had heard the evidence of Appellant as to value. Instead of putting on proof Appellee has resorted to unsupported sly innuendoes in its Brief that the evidence received and acted upon by the Referee should be disregarded on review and appeal. Many partnerships hold record title to realty in the names of individual partners. There is nothing wrong with this. What fraud is Appellee accusing Appellant of? Appellee has been defrauded of nothing. It has received everything it

bargained for with the Herters. There is no fraud and no one has suffered any damages.

In 23 *Cal. Jur.* 2d, at p. 99, it is stated:

> "It is an established principle of law and equity that, in the absence of a statute specifically giving a right of action, fraud which has produced and will produce no injury furnishes no ground of action or defense. . . . Likewise, in the absence of a confidential relationship, where a purchaser of land obtains the identical property he intends to purchase and is not deceived as to its quantity or quality and the property is worth all that is paid for it, he cannot complain because the seller has a collateral personal interest in the sale."

Title was placed in Herter's name for purpose of obtaining desired zoning only. Appellant does not dispute the validity of Appellee's trust deed or that it owes the amount of the debt contracted by Herters with Appellee. Appellee has the obligation of the Herters to pay the debt. It has a valid trust deed on the real property. What more was it to receive? Of what has it been defrauded? Zoning permits property to be used by anyone in the world for certain uses. It is objective. It should be immaterial as to who owns it but personalties arise between applicants and members of planning commission. However, no change of zoning has been obtained and no one whomsoever has been misled to any degree to his detriment. There has been no fraud or mendacity and none has been shown. Such vague general charges are easy to make by insinuation and are difficult to refute.

CONCLUSION

The Referee's findings, conclusions and order are fair and reasonable and should be affirmed upon this appeal. Appellant is not requesting that Appellee's debt or lien be held invalid. Appellant is only requesting that Appellee be restrained, while remaining fully secured, for a reasonable time so that Appellant's equity in its property will not be forfeited by foreclosure.

Dated, Fresno, California,
January 5, 1968.

Respectfully submitted,
W. A. McGugin,
Attorney for Appellant.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

W. A. McGugin,
Attorney for Appellant.